No. 85-1353

Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOANN FORD BOX,

Petitioner,

v.

A&P TEA COMPANY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE F. GALLAND, JR.*
PAUL L. STRAUSS

DAVIS, MINER, BARNHILL
& GALLAND
14 West Erie Street
Chicago, IL 60610
(312) 751-1170
Counsel for Petitioner
JoAnn Ford Box

*Counsel of Record

Pandick Midwest, Inc., Chicago • 733-6000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOANN FORD BOX,

Petitioner,

v.

A&P TEA COMPANY,

Respondent.

As the petition for *certiorari* showed, this case will be governed by this Court's disposition of *Celotex Corp. v. Catrett,* No. 85-198, *cert. granted* 106 S.Ct. 342 (1985). In *Celotex,* the Court of Appeals majority held that a movant must support its motion for summary judgment with evidence. Judge Bork, dissenting, argued that the showing required on a summary judgment motion need not always be made through evidence, but he cautioned that summary judgment should not be granted against a plaintiff for failure to produce evidence unless the plaintiff was specifically challenged to produce that evidence in the district court.

In this case the principles of both the majority and dissent in *Celotex* were violated. A&P offered no evidence or argument to support the ground on which summary judgment was affirmed. And the Court of Appeals faulted petitioner for failing to produce evidence on an issue that petitioner was never challenged to address in the district court. Whether this Court

agrees with the majority or the minority view of *Celotex, Box* was wrongly decided.

A&P makes two arguments to avoid *Celotex*. First, A&P says this case is unlike *Celotex* because here A&P supported its motion for summary judgment with evidence. This has no merit. A&P offered no evidence or argument *on the issue on which the Court of Appeals affirmed summary judgment.*[1] A&P is therefore arguing that if it offers evidence on an irrelevant issue, it excuses itself from the burden of offering evidence on the issue on which summary judgment is granted. Nothing in the majority or dissenting opinions in *Celotex* supports this idea. *Celotex* holds that a summary judgment motion can be granted only if supported by evidence *on the issue on which the motion is granted.*[2] Thus, *Box* and *Celotex* raise exactly the same question: whether summary judgment may be granted on a ground as to which the movant has offered no evidence.

Second, A&P argues that petitioner did have notice in the district court that she was being challenged to produce evidence on the issue raised by the Court of Appeals—whether petitioner would have applied for specific assistant manager vacancies had she known of them. A&P does not and cannot claim that petitioner received such notice from anything in A&P's own motion and briefs, since they did not mention this issue. See Petitioner's Appendix I, J, and K. Instead, A&P points to a

---

[1] A&P's summary judgment motion argued that petitioner had not filed an EEOC sex discrimination charge and had lost out only to other women in competition for bookkeeper jobs. A&P offered a small amount of evidence on these two claims. A&P, however, offered no evidence whatsoever on the issue decided by the Court of Appeals—whether petitioner would have applied for specific assistant manager jobs had she known of them. To the contrary, A&P argued that any job other than bookkeeper was irrelevant because petitioner's case was confined to a dispute about bookkeeper jobs alone. (Petitioner's Appendix I, J, and K.)

[2] Contrary to A&P's belief, the movant in *Celotex did* offer evidence. See Brief for Respondent in *Celotex*, No. 85-198, pp. 2, 6-7. So in fact, this case is indistinguishable from *Celotex*. In both cases the movant offered evidence, but not on the issue on which summary judgment was granted.

single sentence in the sur-reply brief filed by *petitioner* in the district court. This sentence, according to A&P, shows that even though A&P's own motion and briefs said nothing about the "would have applied" issue, petitioner managed to figure out that she was expected to offer evidence on it.

This argument is legally without merit. A party who is required to produce evidence or face summary judgment is not required, in the absence of notice, to guess at the issue on which evidence is demanded of her; she is entitled to specific notice. Only if she receives specific notice from the movant of the issue in question can she be expected to understand that she has an affirmative obligation to produce evidence on that issue, even though the movant has produced none.

Moreover, A&P misreads petitioner's sur-reply brief. That sur-reply brief reveals not even a glimmer of understanding on petitioner's part that she was being challenged to produce evidence on whether she would have applied for specific assistant manager vacancies. Instead, it reflects petitioner's clear understanding that she had squarely met every argument that A&P had made.[3]

---

[3] The sentence quoted by A&P (Respondent's Appendix 4a), is plucked from petitioner's summary of her response to A&P's "bookkeeper" argument. A&P had asked for summary judgment because all the bookkeeper jobs petitioner had applied for had been filled by women, not men. Petitioner responded that she had not limited herself to applying for bookkeeper positions, but had sought promotion for other positions, in particular the assistant manager position, which A&P had filled with men without accepting applications. She added: "And even if Box could not point to a specific position for which a man was preferred, her relegation to a limited employment path in which she was not given a chance to compete with men was clearly discriminatory." Respondent's Appendix 4a.

A&P misconstrues this sentence as an acknowledgement by petitioner that she knew she had to produce evidence that she "would have applied" for a specific position and an admission that she could not provide such evidence. In fact, as the context shows, her meaning was precisely the opposite. Mr. Box was stating that she *had* offered evidence that she had applied for a specific category of position—the assistant manager position—even though she had not been required to offer such evidence.

In short, this case is *Celotex,* whether from the majority's or dissent's perspective. The Court of Appeals gave summary judgment to a party on an issue on which it offered no evidence or argument in the district court, and which petitioner had no notice that she had to address.[4]

A&P also has no adequate response on the substantive Title VII issue raised by petitioner—whether the Court of Appeals erred in requiring a Title VII plaintiff's *prima facie* case to identify the specific positions she would have applied for had she known the employer was filling them. Aside from trying to recast the contrary holdings of the Fourth, Eighth, Ninth, and Eleventh Circuits, A&P argues that a Title VII plaintiff such as Ms. Box must identify the specific positions she would have applied for because otherwise she cannot rule out the possibility that her rejection was due to lack of qualifications. (Respondent's Brief 10.) On the contrary, as the petition showed, A&P prevented Ms. Box and other women from being considered. It did not reject her after a specific comparison with specific men for specific positions. So proving she would have applied for a specific position would show nothing about why A&P selected a man for it. Instead, as the Fourth and Eighth Circuits point out, plaintiff satisfies any "application" requirement by showing she expressed interest in promotion to the *category* of position that the employer was filling without taking applications. Ms. Box did this.

---

[4] This conclusion likewise disposes of A&P's attempt to defend the Court of Appeals' affirmance on a factual ground that had not been raised in the district court. A&P argues that a Court of Appeals may affirm summary judgments on grounds not addressed by the district court. But a Court of Appeals may *not* do this unless the party opposing summary judgment had notice in the district court of the factual issue addressed by the Court of Appeals. *Fountain* v. *Filson,* 336 U.S. 681, 683 (1949).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

GEORGE F. GALLAND, JR.*
PAUL L. STRAUSS

DAVIS, MINER, BARNHILL
& GALLAND
14 West Erie Street
Chicago, IL 60610
(312) 751-1170
Counsel for Petitioner
JoAnn Ford Box

*Counsel of Record